

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

FOHSE INC.,	)	
	)	
Plaintiff,	)	Case No.: 2:22-cv-00618-GMN-DJA
vs.	)	
	)	<b>ORDER DENYING ATTORNEY’S FEES</b>
ESTTECH INC.,	)	
	)	
Defendant.	)	
	)	

The Court dismissed this patent action between Plaintiff FOHSE Inc. and Defendant ESTTech Inc. *sua sponte* for lack of subject matter jurisdiction after a hearing on several motions, all of which were denied as moot.<sup>1</sup> (Order, ECF No. 54). In its Order, the Court noted that it would retain jurisdiction to consider a subsequent motion for attorney’s fees and costs “if Defendant can articulate a reasonable basis for such an award.” (*Id.* 4:8–9). The Court cited *Russell City Energy Co., LLC v. City of Hayward* to highlight for Defendant that, with some exceptions, “a court that has dismissed a case for lack of subject matter jurisdiction generally has no jurisdiction to award attorneys’ fees.” (*Id.* n.4) (quoting *Russell City Energy Co., LLC v. City of Hayward*, No. C-14-03102 JSW (DMR), 2015 WL 983858, at \*2 (N.D. Cal. Feb. 17, 2015), *report and recommendation adopted*, No. C 14-03102 JSW, 2015 WL 994533 (N.D. Cal. Mar. 4, 2015)).

Defendant then filed the instant Motion for Attorney's Fees, (ECF No. 55). Plaintiff filed a Response, (ECF No. 56), to which Defendant filed a Reply, (ECF No. 57). Plaintiff also

<sup>1</sup> The Court expressed its concern regarding subject matter jurisdiction at the hearing and ordered Plaintiff to file a motion to amend the complaint, or alternatively the parties to file a stipulation to amend the complaint. Plaintiff instead filed a Motion to Dismiss and, in the alternative, a Motion/Notice of Voluntary Dismissal pursuant to Fed. R. Civ. P. 4.

1 filed a Motion to Strike or alternatively to file a Surreply, (ECF No. 58),<sup>2</sup> to which Defendant  
2 filed a Response, (ECF No. 60).

3 Defendant's Motion for Attorney's Fees does not address *Russel City Energy Co.* or the  
4 general rule that courts do not have jurisdiction to grant attorney's fees after a case was  
5 dismissed for lack of subject matter jurisdiction. Instead, Defendant proffered two legal bases  
6 for its Motion: Federal Rule of Civil Procedure 41(a)(2) and 35 U.S.C. § 285. (Mot. Atty Fees  
7 3:13–6:19, ECF No. 55). In its Reply, however, Defendant admits that it “missed the mark”  
8 and “unilaterally withdraws its prior reliance on Federal Rule of Civil Procedure 41(a)(2) and  
9 35 U.S.C. § 285.” (Reply 3:11–14, ECF No. 57). Defendant then articulates a new basis for  
10 attorney's fees under 28 U.S.C. § 1927. (*Id.* 3:14–15).

11 Defendant improperly seeks to correct its deficient Motion in its Reply. This Court  
12 “need not consider arguments raised for the first time in a reply brief.” *Zamani v. Carnes*, 491  
13 F.3d 990, 997 (9th Cir. 2007). Rather than counter Plaintiff's arguments in the Response brief,  
14 Defendant admits that Plaintiff's arguments are correct and seeks a do-over, relying on a new  
15 legal basis for attorney's fees. *See Novosteel SA v. U.S., Bethlehem Steel Corp.*, 284 F.3d 1261,  
16 1274 (Fed. Cir. 2002) (emphasis in original) (“[R]epley briefs *reply* to arguments made in the  
17 response brief—they do not provide the moving party with a new opportunity to present yet  
18 another issue for the court's consideration.”).

19 Defendant's improper attempt at a do-over is all the more apparent by Defendant's  
20 support of Plaintiff's right to file a surrepley to address this new legal basis. (Reply 3:15–16).  
21 But Defendant cannot cure its insufficient Motion by displacing its legal arguments with a new  
22 legal argument in its Reply and consenting to a surrepley. Defendant conceded that it failed to  
23 meet its burden. The Court therefore DENIES Defendant's Motion for Attorney's Fees  
24 because Defendant failed to articulate a reasonable basis for such fees in its Motion. Moreover,  
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<sup>2</sup> Plaintiff filed a Notice of Corrected Image/Document, (ECF No. 59).

1 the Court notes Defendant's new argument in its Reply relies on the Court's discretion to award  
2 fees in cases of unreasonable or vexatious litigation. *See* 28 U.S.C. § 1927. Even if the Court  
3 entertained Defendant's improper argument, the Court would nonetheless decline to exercise its  
4 discretion to award fees after this case was dismissed for lack of subject matter jurisdiction.  
5 Defendant's Motion is therefore dismissed with prejudice. In light of the Court's disposition of  
6 the Motion for Attorney's Fees, the Court DENIES Plaintiff's Motion to Strike or alternatively  
7 to file a Surreply as moot.<sup>3</sup>

8 **IT IS HEREBY ORDERED** that the Motion for Attorney's Fees, (ECF No. 55), is  
9 **DENIED**.

10 **IT IS FURTHER ORDERED** that the Motion to Strike, (ECF No. 58), is **DENIED** as  
11 **moot**.

12 Dated this 17 day of June, 2024.

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15 Gloria M. Navarro, District Judge  
16 United States District Court  
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<sup>3</sup> Plaintiff also requests attorney's fees and costs associated with bringing its Motion to Strike. In its discretion, the Court denies Plaintiff's request for fees and costs.